

## INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute and regulations involved.....	2
Statement.....	2
Argument.....	6
Conclusion.....	11
Appendix.....	13

### CITATIONS

#### Cases:

<i>Burk-Waggoner Assn. v. Hopkins</i> , 269 U. S. 110.....	11
<i>Commissioner v. Horseshoe L. Syndicate</i> , 110 F. 2d 748, certiorari denied, 311 U. S. 666.....	7, 9, 10
<i>Commissioner v. Rector &amp; Davidson</i> , 111 F. 2d 332, certiorari denied, 311 U. S. 672.....	7, 8, 10
<i>Helvering v. Coleman-Gilbert</i> , 296 U. S. 369.....	7
<i>Helvering v. Comba</i> , 296 U. S. 365.....	7
<i>Morrissey v. Commissioner</i> , 296 U. S. 344.....	7, 11
<i>Swanson v. Commissioner</i> , 296 U. S. 362.....	7
<i>Thrash Lease Trust v. Commissioner</i> , 99 F. 2d 925, certiorari denied, 306 U. S. 654.....	11

#### Statutes:

Internal Revenue Code:	
Sec. 1141 (26 U. S. C. 1940 ed., Sec. 1141).....	6
Sec. 3797 (26 U. S. C. 1940 ed., Sec. 3797).....	6, 13

#### Miscellaneous:

T. D. 5468, 1945 Cum. Bull. 332.....	15
Treasury Regulations 103:	
Sec. 19.3797-1.....	11, 13
Sec. 19.3797-2.....	9, 14
Sec. 19.3797-4.....	15

(1)

#### REFERENCES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1307

WABASH OIL AND GAS ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIRST  
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 20-29) is reported in 6 T. C. 542. The opinion of the Circuit Court of Appeals (R. 38-43) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 3, 1947 (R. 43). The petition for a writ of certiorari was filed on April 29, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether the taxpayer is an association taxable as a corporation within the meaning of Section 3797 of the Internal Revenue Code.

**STATUTE AND REGULATIONS INVOLVED**

The pertinent statute and regulations are set forth in the Appendix, *infra*, pp. 13-15.

**STATEMENT**

The facts, most of which were stipulated between the parties (R. 16-19), were found by the Tax Court accordingly (R. 20-27). They were summarized by the Circuit Court of Appeals sufficiently for present purposes as follows (R. 39-41):

During the summer of 1940, one Carey, of Grayville, Illinois, and one Patton, of Newton, Massachusetts, who had long been associated in the lumber milling business in Grayville, Patton being an inactive partner, solicited their friends and relatives for subscriptions (they raised approximately \$19,000) to finance a venture in a newly discovered oil bearing area near Grayville. With the money so raised, they obtained an oil and gas lease in the name of Patton as lessee on a tract of land in the area, and, neither having had any experience in the oil business, they employed an experienced oil operator to take over the property and drill a well on it. This well began to produce early in December, 1940, and thereupon Carey purchased

necessary supplies and equipment with money sent him by Patton and arranged for the sale of the entire oil production. (R. 39.)

There was no written plan of organization prior to the time when the well was brought in. Soon thereafter, however (December 23, 1940) "Articles of Agreement" were prepared and executed by all the subscribers. (R. 39.)

In these Articles, it is first set out that the subscribers, who are listed with the amounts of their subscriptions, had provided the consideration for the oil and gas lease taken in Patton's name and had also provided the funds required for developing the leased property, and then Patton acknowledged and agreed that he "is, and has been, the agent" of the subscribers "in negotiating and securing" the lease and "in the development thereunder"; that "he holds said lease as agent of, and for the benefit of" the subscribers and "will execute such assignments and agreements and do such acts in connection with said lease and the developments thereunder as may be directed by two-thirds in interest of the subscribers hereto." (R. 39-49.)

Following this, the subscribers agree that Patton, Carey, and one Hall of Wellesley, Massachusetts, are to act "as agents and managers of the business of developing the property and marketing the oil, gas and other incidental products to be conducted under said lease under the

trade name of the Wabash Oil and Gas Association," and furthermore that they shall continue so to serve until their successors are appointed as thereafter set forth, and shall receive such compensation for their services as they may unanimously agree upon. Next it is provided that Patton is to act as treasurer of the business, Carey as superintendent of its active operations, and Hall in an advisory capacity with final power to decide any difference of opinion which may arise between the other two. The subscribers then agree that "These three shall have full power to conduct the business with all the powers that we should have if personally present and active," including among other specifically enumerated powers, the power to borrow money and pledge or mortgage the "lease or other assets of the business as security therefor." (R. 40.)

The Articles of Agreement continue with provisions requiring the agents and managers to keep open books of account and to make quarterly distribution of the net earnings of the business to the subscribers in proportion to their respective financial interests, subject, however, to the managers' power to reserve such portion of net earnings as may in their judgment be needed for working capital (R. 40).

Provisions follow to the effect that should Patton die, resign, or for any reason become unable to act, he, or his personal representative, will assign the lease to any person named by the other

two agents; that a majority in interest of the subscribers may remove and also replace any agent; that written approval of two-thirds in interest of the subscribers is required to authorize the agents to sell either the leasehold or the equipment purchased for use in the business; that in every contract, order, or obligation entered into by the agents on behalf of the Association it shall be stipulated that the other contracting party "shall look only to the leasehold and property used in said business for payment" and that neither the agents, the subscribers nor their successors shall be personally liable therefor;<sup>1</sup> and that any subscriber may sell his interest provided only that he first give the agents an opportunity to buy that interest for the benefit of the other subscribers (R. 40-41). The Articles conclude with the provision (R. 41):

This agreement shall continue during the term of said lease and no one of the parties hereto shall be entitled to any dissolution or termination of this agreement, but on the death or bankruptcy of any one of them, the personal representatives or the trustee in bankruptcy, as the case may be, shall succeed to the interest.

During the year 1941, the Association had no office, held no meetings, made no distribution of

---

<sup>1</sup> This provision was stricken from the Articles on December 31, 1941, all but four of the subscribers assenting thereto (R. 25, 41).

net earnings, and, other than an unsigned copy of the Agreement, gave no certificate or evidence of ownership to any of the subscribers (R. 41).

The Association filed its income tax return for 1941, the year involved, as a partnership.<sup>2</sup> The Commissioner, however, determined a deficiency on the ground that although an association, it was "includible in the definition of a 'corporation' as prescribed by Section 3797 (a) (3) of the Internal Revenue Code" (R. 8). On appeal, the Tax Court, concluding "that petitioner more closely resembled a corporation than a partnership or joint venture," affirmed the Commissioner's determination (R. 41). The taxpayer thereupon petitioned for review (R. 33-34), and the Circuit Court of Appeals affirmed (R. 38-43).

#### **ARGUMENT**

The Circuit Court of Appeals, affirming the Tax Court's decision which had approved the Commissioner's determination, correctly held (R. 41-43) that the taxpayer is an association taxable as a corporation under the provisions of Section 3797 of the Internal Revenue Code and the applicable Treasury Regulations (Appendix, *infra*, pp. 13-15. It properly applied the principles

<sup>2</sup> Its return was timely filed with the Collector of Internal Revenue for the Eighth District of Illinois. Review in the Circuit Court of Appeals for the First Circuit was effected by stipulation in writing pursuant to the provisions of Section 1141 (b) (2) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 1141). (R. 33, 41.)

enunciated by this Court in *Morrissey v. Commissioner*, 296 U. S. 344, 357, 361, that the statute's classification of associations with corporations "implies resemblance \* \* \* and not identity"; that the character of the organization is to be determined by the terms of the trust instrument or other agreement; and that, as stated in *Helvering v. Coleman-Gilbert*, 296 U. S. 369, 374, the parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in their agreement.

The taxpayer asserts that the decision below is in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner v. Horseshoe L. Syndicate*, 110 F. 2d 748, certiorari denied, 311 U. S. 666, and *Commissioner v. Rector & Davidson*, 111 F. 2d 332, certiorari denied, 311 U. S. 672, as to the application of the above-stated principles. While we think those decisions are incorrect because they disregarded and failed to follow the principles enunciated by this Court in the *Morrissey* and related cases,<sup>3</sup> they are nevertheless distinguishable upon the facts and not in conflict.

Thus, in the *Horseshoe L. Syndicate* case, the court held that while the Syndicate organized by two individuals and a corporation who owned an

<sup>3</sup> *Helvering v. Coleman-Gilbert*, *supra*; *Swanson v. Commissioner*, 296 U. S. 362; and *Helvering v. Combs*, 296 U. S. 365.

oil lease, for the purpose of drilling and operating oil wells, sold fractional interests in the lease, no centralized management was achieved by election but only through powers of attorney executed by each holder of a fractional interest. The court observed that no continuity of existence was contemplated or provided for, no limitation of personal liability, no officers or directors were elected, no meetings held, no by-laws enacted, no declaration of trust made, and the unit holders had no voice in the management of the affairs of the Syndicate. Pointing out that the owners of the lease were tenants in common, the court held that the Syndicate more nearly resembled a partnership than a corporation, and that therefore it was not an association taxable as a corporation within the meaning of Section 1111 (a) (2) of the Revenue Act of 1932.

Likewise, in the *Rector & Davidson* case, the court held that although the management was in the hands of two of the co-owners who acted as agents for the others, there was no centralized management by the shareholders' votes but only by the creation of an agency relation by each co-owner as principal. It pointed out that there was no trust created, no provision for continuity of existence, no limitation of personal liability, no stock issued, no meetings held, and the enterprise had no office, seal, minutes or stock books. Con-

sequently the court, following its previous decision in the *Horseshoe L. Syndicate* case, held that the taxpayer was a syndicate or joint venture resembling a partnership more than a corporation, and therefore not an association taxable as a corporation within the meaning of the statute.

In the present case, however, the taxpayer, under the facts of record, plainly had all the essential attributes and characteristics of a corporation—creation of an association for the purpose of conducting business for profit; centralized control and management reposed in three persons of the associates' choosing;<sup>4</sup> title to the business property (oil lease) held for the benefit of the group of associates by their representative; continuity of existence through the provisions for succession of their agents and managers and security from termination of the enterprise by reason of the death of any of the beneficial owners; facility of transfer of the beneficial interests of the participants; and limitation, during the tax year here involved, of personal liability of the associates and their managers or agents similar to that of corporate directors and stockholders.

---

\* Whether the three persons chosen by the several associates had the title of trustees, managers or agents is immaterial. Their acting in a representative capacity for the group of participants was sufficient. Section 19.3797-2, Treasury Regulations 103 (*Appendix, infra*, pp. 14-15).

Moreover, in both the *Horseshoe L. Syndicate* and *Rector & Davidson* cases, the court stated that it was required to sustain the decisions of the Board of Tax Appeals (now the Tax Court) because they were supported by substantial evidence. Here too, the court below affirmed the Tax Court, and its decision may well be supported on that ground.\* Indeed, in the court below, the taxpayer recognized that each case involving this issue must be judged on its own facts.

The taxpayer asserts that the provisions of the agreement herein, relative to termination of the enterprise and assignability of interests, adds nothing except that which is, in any event, required by the mining law of the United States forbidding termination of mining enterprises by the withdrawal of a member or by assignment of interest (Pet. 9-10). But whether such provisions are required or implied or not is irrelevant; what is controlling is the fact of their existence. Nor is the taxpayer aided by a showing that for some purposes the associates may be considered tenants in common (Pet. 1-2, 9). It is settled that an organization may be taxed as a corporation even though under state law it is treated otherwise than as a legal entity, at

---

\* The court below considered it unnecessary to decide the scope of its reviewing power because it held that the taxpayer bore almost complete resemblance to a corporation and was therefore taxable as such in any event (R. 42-43).

least so long as it transacts its business as if it were incorporated. *Burk-Waggoner Assn. v. Hopkins*, 269 U. S. 110, 114; Section 19.3797-1, Treasury Regulations 103 (Appendix, *infra*, pp. 13-14). Moreover, the taxpayer does not deny that its organization was the result of an agreement whereby a number of individuals combined together in an unincorporated association for the purpose of realizing greater profits from the exploitation of its oil lease by the pooling of individual interests. *Morrissey v. Commissioner*, *supra*, p. 357. The taxpayer itself states that the associates under the agreement embarked upon "a course of conduct to their common advantage." (Pet. 9.) There is abundant evidence in the record of the commercial character of the enterprise which establishes clearly its role as a profit-making medium (R. 20-27), and therefore that it is an association taxable as a corporation under the *Morrissey* and related cases. See also *Thrash Lease Trust v. Commissioner*, 99 F. 2d 925 (C. C. A. 9th), certiorari denied, 306 U. S. 654, involving a very similar factual situation, wherein the court held that a group of individuals organized to develop and operate oil property constituted an association.

#### CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. The petition

for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,  
*Acting Solicitor General.*

SEWALL KEY,  
*Acting Assistant Attorney General.*

ROBERT N. ANDERSON,  
S. DEE HANSON,

*Special Assistants to the Attorney General.*

MAY 1947.

## APPENDIX

### Internal Revenue Code:

#### SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof —

(1) *Person*.—The term “person” shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation.

\* \* \* \* \*

(3) *Corporation*.—The term “corporation” includes associations, joint-stock companies, and insurance companies.

\* \* \* \* \*

(b) *Includes and Including*.—The terms “includes” and “including” when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

\* \* \* \* \*

(26 U. S. C. 1940 ed., Sec. 3797.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.3797-1. *Classification of taxables*.—For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection. \* \* \* The

term "partnership" is not limited to the common law meaning of partnership, but is broader in its scope and includes groups not commonly called partnerships. (See section 19.3797-4.) The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, and insurance company, and certain kinds of partnerships. (See sections 19.3797-2 and 19.3797-4.) The definitions, terms, and classifications, as set forth in section 3797, shall have the same respective meaning and scope in these regulations.

SEC. 19.3797-2. *Association*.—The term "association" is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known)

which is not, within the meaning of the Code, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.<sup>1</sup>

SEC. 19.3797-4. *Partnerships.*—The Internal Revenue Code provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as known at common law but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. On the other hand the Code classifies under the term "corporation" an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation. \* \* \*

\* \* \* \* \*

---

<sup>1</sup> The amendment effected by T. D. 5468, 1945 Cum. Bull. 832, as to "investment" trusts does not apply to this case.